IN THE

Supreme Court of the United States

NO. 646 OCTOBER TERM, 1920.

JOSEPH A. BURDEAU, Appellant,

vs.

J. C. McDOWELL, Appellee.

On Appeal From the District Court of the United States for the Western District of Pennsylvania.

Correction of the Record.

One of the significant incidents in this case has been the insistent attempt of the appellant to create an unwarranted prejudice against the appellee by injecting into the record at every opportunity incompetent and immaterial matter, the incompetency and immateriality of which precluded the appellee from effectually answering and denying the same. In his answer he dwells at length upon an alleged confession of one F. M. Lowry and attaches the so-called confession as an exhibit. In the Court below the appellee offered to prove the falsity of the statements therein contained but was prevented by the Court which held that the offer was irrelevant, immaterial and inadmissible. Notwithstanding this fact the appellant once more injected this so-called confession into his petition for a supersedeas in this Court for the purpose of creating prejudice against the appellee. When the record in the Court below was tran-

scribed it was discovered that for some mysterious reason appellee's offer and the ruling of the Court had been omitted. By agreement of the parties and by direction of the Court below the record was amended by inserting an additional page, to wit, page 114½ into the transcript.

In the printed record in this court this page 114½ is again omitted. In view of the repeated use made of and unwarranted emphasis given to this alleged confession, reference thereto having even been made in the appellant's brief, we deem its omission prejudicial to the appellee and ask that this page of the original transcript be treated as a part of the record in the case as though fully set forth therein.

After conference with the Solicitor General on this subject he has agreed that this missing page shall be printed in this brief and shall be treated as a part of the record in the case. The missing page properly belongs in the Record at the conclusion of the testimony of Frank B. Barnard at the foot of page 78 and is as follows:

"By Mr. Imbrie:

> We desire to call the attention of the Court to Exhibit "A" attached to the answer of Joseph A. Burdeau, the respondent, which purports to be a letter written by one F. M. Lowry, now deceased, and also to the references made to that letter in the answer itself and in the affidavit of William B. S. Winans attached to and made a part of said answer. This alleged letter certainly has no proper place either in the answer or in this proceeding, but inasmuch as it has been injected into the record

for the improper purpose of reflecting on and in some manner prejudicing the petitioner we offer to prove by F. B. Barnard, the witness on the stand and the same person who is referred to by that name in the letter in question, that the statement relating to the payment of anything by him to McDowell, the petitioner, is absolutely and unqualifiedly false and untrue.

By the Court:

The truth or falsity of the charges against the petitioner and the truth of the statements contained in the letter referred to are not an issue in this proceeding, and therefore the offer is irrelevant and immaterial and inadmissible.

By Mr. Imbrie:

Without taking issue with the Court's ruling, but for the sole purpose of completing the record we desire to advise the Court that we have present as a witness Mr. George W. McMullin, who is the only other person referred to in said F. M. Lowry letter, and we offer to prove by him that the statements contained in that letter and referred to in the answer and in the Winans' affidavit, which is made a part of the answer, are absolutely false and untrue.

By the Court:

Under the issue in this proceeding this evidence is not admissible.

Brief for Appellee.

The uncontradicted testimony establishes and the Court below found that a great quantity of private books and papers and furniture belonging to J. C. McDowell, the appellee, were seized and appropriated by Henry L. Doherty & Company and their employees. The Court finds they were stolen. The brief of appellant denies that they were stolen but in substance and effect declares that they came legally into the temporary possession of Henry L. Doherty and Company as bailees, and that the larceny was that of a bailee and not theft by a trespasser. It is not disputed, however, that possession of a considerable portion of the papers was secured by Henry L. Doherty and Company by drilling two safes and jimmying a roll top desk, and that this was done after opportunity had been given to them to inspect and remove any papers not the private and personal papers of McDowell. In addition private papers filed in filing cabinets were taken at the same time.

It was admitted by the appellant that many of these papers which had been unlawfully appropriated or stolen by Henry L. Doherty and Company were in his possession. He was a receiver of the stolen property. It was at no time denied by the appellant that part of the papers so as aforesaid in his possession were the private papers of the appellee, and at no time during the trial in the Court below did he allege that any of said papers were other than private papers of McDowell,

and the appellee in his petition asked only for the return of his private papers. If any of the papers in appellant's possession were other than private papers they would have been promply eliminated from the proceeding by the Court, with the consent of the petitioner. Appellant was asked to submit them to the Court and he declined (R. 81).

The confusion which has now been injected into the case on the question as to whether or not all of these papers were the private papers of the appellee is the direct result of the erroneous theory upon which the appellant defended the proceeding in the Court below. He defended solely on the theory that if he could show that the actual theft of the papers had not been committed by a government officer or agent the petitioner would thereby be deprived of his legal and equitable right to recover his property, and accordingly he permitted the petitioner and the Court to assume that all of the papers in his possession were of the kind mentioned in the petition, to wit, "personal and private books, papers, memoranda, letters, copies of letters, correspondence, diaries and other data." His theory of the case is shown in his remarks to the Court after the Court had signified the disposition which it intended to make of the case. He said: "May I slightly emphasize the position of myself as a representative of the Government. The Government, of course, had no knowledge of these things at the time they took place. The Government obtained physical possession of these papers from a person claiming to have a right to them. The Government has no interest in the papers as such. * * *

There is certainly no privity between the Department of Justice and the petitioner here. They came to us peaceably from a third person. Now, those papers will be subdivided into different classes. It may be that when the papers are exhibited to Your Honor you will say that some of them are private papers of J. C. McDowell. Now, whether they are or not is no concern of the Government, * * *." (R. 101.)

In other words it was a matter of no consequence to the appellant whether he was the recipient of stolen goods belonging to McDowell or the rightful custodian of the property of Henry L. Doherty and Company. He refused to recognize that McDowell had a legal right in an equitable proceeding to recover his personal and private property when that property was of such a nature that damages at law could not adequately compensate him.

Reply to Appellant's Brief.

The appellant in his brief advances three propositions. The mere recital of these propositions vindicates the contention of the appellee in his motion to dismiss for want of jurisdiction on the ground that no constitutional question is involved. These propositions are to the effect that the Court below is in error:

1. In holding that the papers in question were the private property of McDowell (Appellants Brief, p. 11).

2. In finding that the papers in question had been stolen (Appellants Brief, p. 16), and

3. In denying the title of the government to stolen private papers against their owner after timely proceeding had been had for their recovery. (Appellants Brief, p. 19.)

The brief of the appellant in this case is an astounding perversion of fact and a studied effort to create prejudice against the appellee by the injection of immaterial and unsupported allegations.

His first assertion is that "it was not shown that any book, paper or other document which was the private property of McDowell was delivered to or was ever in the possession of appellant." The attention of the Court is invited to the uncontradicted proof in the case. Miss Melus, petitioner's private secretary, testified that Winans, one of the principals in the theft, insisted on taking McDowell's personal papers (R. 48); that she was entirely excluded from the room where the papers were (R. 47, 50); that all papers in the large safe and the roll top desk were the private papers of McDowell, and that she submitted them to Winans for inspection after which they were relocked (R. 48-49); that all of the furniture, including roll top desk and filing cabinets which contained the papers in question were McDowell's personal property (R. 46, 50); that Room 1320, although the lease was in the name of the Quapaw Gas, Company, was not used by that company after 1915 but was rented by them for the use of Mr. McDowell (R. 46, 54); that the papers stolen included private

papers that had accumulated from almost the time that Mr. McDowell started in business (R. 56). It was admitted by Winans, one of the principals in the theft, that Mr. McDowell's name alone appeared on both office doors (R. 25); that he had jimmied and opened Mr. McDowell's private roll top desk and removed the contents (R. 26, 89). He denied his ability to describe any of the papers which he took from McDowell's office (R. 29) when he was afforded an opportunity by McDowell's attorneys to establish the true character of the papers taken by him and at the time within his reach if he alleged them to be other than private in their nature. The testimony of Krull, one of the detectives who guarded the office which contained the papers, established that both safes were drilled by the use of gas by men sent from New York (R. 67), and that the large safe contained among other things bonds, stocks and insurance policies that were the private property of Mr. McDowell, and that when he undertook to list the papers which the safe breakers removed they refused to permit it and destroyed the list which he started to make (R. 68, 70).

The appellant himself admitted the possession of a letter which its writer testified was a private letter to Mr. McDowell that had been taken from McDowell's desk (R. 75, 76). It was not contradicted by the appellant that private papers were taken by the persons who looted the petitioner's office, and the answer filed to the petitioner admits that some of the papers taken were in his possession and under his control (R. 10). The only question raised was as to whether Room 1320 was the office of McDowell who used it and whose name ap-

peared on the door, or of the Quapaw Gas Company that paid the rent. It is contended by the appellee that the location of private and personal papers does not control their legal title any more than it can determine the ownership and title of the furniture which is admittedly the property of the appellee and which was stolen by the same persons that stole the papers in question. The appellant had possession of these papers at the time the case was tried and had they not been the private papers of the petitioner he could readily have established it.

The appellant during the trial in the Court below admitted that "as a representative of the United States, I have certain papers which I assume were taken from the office of Mr. McDowell" (R. 81), and the petitioner urged that they be submitted to the Court who could have determined the question as to the private nature of the same had such a question been seriously raised, but the appellant objected to their submission to the Court. All that the petitioner requested was the return of private and personal papers, books, etc. Possession of the papers put it peculiarly within the power of the appellant to establish their real character, but he in his answer makes no allegation that any of the papers in his possession are the property of anyone other than the petitioner. His answer is cunningly drafted and evasively worded. In the fourth paragraph (R. 10) by adding a final modifying clause, which is entirely foreign to the allegation in the petition to which it purports to be an answer, he has devised an evasion by which he denies his possession of, and his intention to present to a Grand Jury any private papers of the petitioner, and without the insertion of that concluding

clause which is not responsive to the allegation in the petition he would have been compelled to admit the allegations of the petitioner. In the fifth paragraph of the answer (R. 10) the appellant has craftily evaded the allegations of petitioner (R. 5) by denying that the books and papers were stolen "*to* further and aid" a Grand Jury investigation, while the petition alleges that they were stolen "by certain persons participating in, furthering and aiding" the Grand Jury investigation. Had this paragraph of the answer been responsive to the petition this allegation of the petitioner would have had to have been admitted. Again in the sixth paragraph of the petition it is alleged that the appellant has used the stolen papers "as the basis and for the purpose of securing other evidence" (R. 6), while the evasive and irresponsive reply thereto in the seventh paragraph of the answer avoids an admission of the allegations of the petitioner by merely denying the success of his alleged purpose.

On the second proposition the appellant undertakes apparently to establish that the offense committed by the persons who looted McDowell's office and appropriated his private papers was something less than larceny, and a casual reading of his own argument seems to establish at least the offense of larceny by bailee. He does not claim a right of property in the alleged thieves but only a right of possesion to enable them to secure and select their own papers from the mixed private and corporation papers. In appellant's brief of argument (p. 17) appears this glaring misstatement of fact: "In the present case, McDowell's representative was allowed to be present and make a list or take copies of all papers

examined." This is absolutely untrue as appears from the uncontradicted testimony in the case including the admissions made by the alleged thieves. McDowell's private secretary testified that she was locked out of Room 1320 where the records were located after March 24, 1920 (R. 47, 50), and Winans, one of the alleged thieves admitted this (R. 31), and Krull, one of the detectives employed by the alleged thieves, was even refused the opportunity of listing the papers taken from the large safe after it had been drilled, although he had been directed by his employer to do so (R. 68, 70).

Appellant's third proposition might be available had the question of the competency of the stolen papers as evidence been raised for the first time during the trial of a criminal case. It is recognized that a Trial Court will not suspend the trial of a case to determine the collateral question of the ownership of papers. In the case at bar, however, we have an entirely different situation. The issue in this proceeding was the title and right of possession of certain private papers alleged to have been stolen. The right to private property can be as effectually asserted against the government as it can against an individual, and the government has no greater right to stolen property than the private citizen. The receiver of stolen goods has no right superior to the right of the thief and the officer or agent of the government who receives stolen goods is in no better position to retain the fruits and advantages of the crime than the humble private citizen.

Brief.

In the case of *Boyd vs. United States*, 116 U. S., 624, Mr. Justice Bradley says "In the case of stolen goods the owner from whom they were stolen is entitled to their possession," and it is this right which the appellee asserted and secured in the Court below.

In the Weeks case (232 U. S., 398) Mr. Justice Day said:

> "The right of the Court to deal with papers and documents, in the possession of the District Attorney and other officers of the Court and subject to its authority, was recognized in *Wise vs. Henkel*, 220 U. S., 556."

Consequently the right which the appellee asserted was a right which the Court had jurisdiction to recognize and preserve.

At the time this proceeding was instituted in the Court below the appellee was without knowledge as to the actual persons who had pilfered his office and taken his papers. He did know that the appellant had possession of some of the papers that were unlawfully taken. Discovery was necessary before it could be determined whether legal or constitutional rights or both had been violated, and in the seventh paragraph of his petition (R. 6) he averred that the possession of said papers by the appellant "is unlawful and in violation of the legal and constitutional rights" of petitioner. Practically all of the testimony that was taken was the testimony of unfriendly witnesses who were employees

of Henry L. Doherty and Company and who had participated directly or indirectly in the stealing of the papers. When this discovery was had it was ascertained by the appellee for the first time just who had stolen his papers and how the theft was accomplished. With this discovery had, the assertion of legal rights only was necessary to compel the judgment of the Court.

The Courts of the United States are open to the citizen for the enforcement of his legal and constitutional rights, and the right to private property may be asserted as a mere legal right or it may be asserted under the guarantees of the constitution.

Abuses of individuals involving the deprivation of the right to the possession, use and enjoyment of private property are adequately redressed by the assertion of the legal rights of the individual in either courts of law or equity. The resort to the limitations of the constitution may be necessary to curb the excesses of the Government.

In the case at bar there can be no question but that replevin would lie against both the thief and the receiver of the stolen goods to recover the private property of the appellee. In a case of this nature and under the circumstances of this case the legal remedy by replevin would have been inadequate as the injury could not be measured in damages. The remedy at law being inadequate it was necessary to resort to the equitable powers of the Court. The fact that the appellant happened to be an officer or employee of the Government provided no immunity to him that could prevent the

owner of private property from asserting his legal rights in either a court of law or equity.

Quite to the contrary, the very fact that he was an officer of the Court enlarged rather than diminished the authority of the Court to exercise control over and deal with the stolen papers which had come into his possession as such officer of the Court.

In this case the proceeding is properly a much more summary proceeding than in a case against a stranger to the Court where the formality and difficulty of securing jurisdiction over both the person and the property might be involved.

The right of a Court of Equity to order and decree the return of private property and papers is well recognized, as is illustrated by the following cases:

In the case of *McGowin vs. Remington*, 12 Pennsylvania State Reports, 56, a Bill in Equity was filed to recover possession of certain notes made by a surveyor and the Court decreed their return specifically. The syllabus in this case is as follows:

> "1. Where the law does not afford adequate redress by compensation in damages for the detention of personal chattels, equity will remedy the injury by decreeing their return specifically.
>
> 2. Where the chattels, whose specific return is sought, consist in part of a kind whose detention cannot, and in part of a kind whose detention can, be adequately compensated in damages, the

detention covering both kinds as one transaction, the jurisdiction and remedies of equity will attach to the whole."

In the case of *Dock vs. Dock*, 180 Pennsylvania State Reports, 15, it is held:

"Letters written by one person to another are the latter's property, and he has a right not only to have them produced for use in litigation, but delivered up to him as the true owner.

A writer of letters has a special property in them to prevent their publication or communication to other persons for use for any illegal purpose by the party wrongfully in possesion of them.

A bill in equity charged that the defendant surreptitiously and illegally took from the trunk of plaintiff's son and from plaintiff's own bureau certain letters written by plaintiff to her son, and by her son to her. Held, that the special right in the letters written by plaintiff was one that could only be adequately protected in equity, and that the court having jurisdiction for discovery should go on and order all the letters to be restored."

In the case of the *Pressed Steel Car Company vs. Standard Steel Car Company*, 210 Pennsylvania State Reports, 464, it is held that:

"Where a car manufacturing company delivers to its customers blue prints in connection with the orders for cars for the information and use of the

purchasers as a necessary part of the transaction, and also for their use in ordering repair parts, and the customers deliver the blue prints to a rival car manufacturing company so that the latter might use them in manufacturing and selling cars and car parts, the latter company will be compelled by a court of equity to surrender up such blue prints to the former company."

The situation in the case at bar was most excellently summarized by the Court below near the conclusion of the trial when he said (R. 81):

> "Of course we have only heard one side of the question, but if the testimony offered on the part of the petitioner is to be believed there was a grossly improper violation of the private rights of somebody. And the property is stolen property. There is no question about it if the evidence is to be believed. And if it is stolen property it belongs to the person from whom it was stolen no matter whether in the hands of the United States or in the hands of a burglar in the penitentiary. * * * These papers are alleged to be the property of the petitioner and the Court has the power and authority to order papers belonging to anybody if they are stolen to be returned to the person from whom they were stolen. They are subject to the order of the Court."

The appellant offered no evidence in contradiction or extenuation but merely demurred to the appellee's evidence (R. 98) and therefore the evidence at the con-

clusion of the case remained as it stood at the time the foregoing remark was made by the Court. It is therefore contended that the judgment of the Court below was entirely proper and that the reason which the Court assigned for the entry of that judgment, to wit, that:

> "The order made in this case is not made because of any unlawful act on the part of anybody representing the United States or any of its departments, but solely upon the ground that the Government should not use stolen property for any purpose after demand made for its return;"

furnishes not only an adequate reason for the judgment which was entered, but completely negatives every contention of the appellant as to the jurisdiction of this Court and the propriety of reversing the judgment of the Court below.

This is an independent proceeding having for its purpose the recovery of property in an equitable proceeding. The law side of the Court provided no adequate remedy. The Court in adjudicating the case properly found that the papers had been stolen; that they were private and personal papers of the appellee, and that they were in the hands of an officer of the Court, and that the owner was entitled to their return. Up to this point no constitutional question is involved. It is, however, respectfully submitted that had the Court below refused under the evidence and the facts in this case to have ordered the return of said books and papers and dismissed the proceeding, and if subsequently a criminal proceeding had been instituted against the appellee and the stolen books and papers been admitted

in evidence over objection, then appellee would have been denied the constitutional right guaranteed him under the 5th amendment to the constitution in that he would have been "compelled in" a "criminal case to be a witness against himself."

It is respectfully submitted that if this conclusion is not correct then a means has been found by which private prosecutors and complainants and those personally interested in the prosecution and persecution of alleged offenders can, by the mere acquiescence of the Government, deprive citizens of the United States of the constitutional rights guaranteed to them by both the 4th and 5th amendments.

It is respectfully contended that the appeal in this case should be dismissed.

A. M. IMBRIE,
E. LOWRY HUMES,
RODY P. MARSHALL,
Attorneys for Appellee.

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IN THE

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NO. 646 OCTOBER TERM, 1920.

JOSEPH A. BURDEAU, Special Assistant to the Attorney General, Appellant,

vs.

J. C. McDOWELL, Appellee.

On Appeal from the District Court of the United States for the Western District of Pennsylvania.

Motion to Dismiss Appeal.

And now, March ....., 1921, comes Jesse C. McDowell, defendant in the above entitled case, by his attorneys, A. M. Imbrie, Rody P. Marshall and E. Lowry Humes, and respectfully moves the Court to dismiss the appeal heretofore allowed in this case, for the following reasons, to wit:

The decision or judgment of the Court below directing the impounding in the hands of the Clerk of the District Court of the private and personal books, papers, memoranda, letters, copies of letters, corre-

spondence, diaries and other data of the defendant in error, and their subsequent return to him is not of such a character as to entitle the plaintiff in error to have said decision or judgment reviewed by the Supreme Court on appeal under the provisions of Section 238 of the Judicial Code (36 Stat. L 1157 as amended 38 Stat. L. 804) in that,

(a) The jurisdiction of the District Court is not in issue nor is it properly before this Court were it in issue.

(b) The decision or judgment appealed from does not involve "the construction or application of the Constitution of the United States."

A. M. IMBRIE,
RODY P. MARSHALL,
E. LOWRY HUMES,
Attorneys for Jesse C. McDowell, Appellee.

Notice of Submission of Motion to Dismiss Appeal.

To Honorable William L. Frierson, Solicitor General for the United States, Appellant in Error:

Please take notice that the foregoing motion, together with the brief of argument hereto attached, will be submitted to the Supreme Court of the United States on Monday, the ..... day of March, 1921, at the Capitol, in the City of Washington, D. C., at the opening of the Court on that day, or as soon thereafter as counsel can be heard.

A. M. IMBRIE,
RODY P. MARSHALL,
E. LOWRY HUMES,
Attorneys for Appellee.

Service of above notice, with copy of said motion and brief attached, accepted....., 1921.

.....

Statement of Facts Upon Which Defendant's Motion Is Based.

Jesse C. McDowell, for many years a Consulting Engineer, residing in Pittsburgh, was employed among others by Henry L. Doherty & Company of New York.

He was an officer and director in the Quapaw Gas Company, a company that was controlled by Henry L. Doherty & Company, which formerly had its General Offices in Pittsburgh, but had removed all offices therefrom several years ago. (Record page 46.) Mr. McDowell maintained two private offices in the Farmers Bank Building, Pittsburgh. The lease for one office which was used as a reception room was in the name of Mr. McDowell. The lease for the other was by arrangement with Henry L. Doherty & Company, taken in the name of the Quapaw Gas Company as part of Mr. McDowell's compensation from Henry L. Doherty & Company, and was for Mr. McDowell's private use.

In this room Mr. McDowell had since about 1913, kept his private office, desk, safe, files and most of his private papers and records, and it was occupied by him exclusively. All the furniture therein including desk, chairs, filecases, safes and other office furniture was the private property of Mr. McDowell, and there was no part of the furnishings of the office which belonged to Henry L. Doherty & Company or the Quapaw Gas Company.

On March 24, 1920, this office and its contents were forcibly taken possession of by parties representing Henry L. Doherty & Company and the Quapaw Gas Company.

On July 15, 1920, he discovered that his safe had been drilled, bored and forcibly opened, and his desk jimmied and broken open and everything therein carried away, together with his maps, furniture, and everything in the office belonging to him had been stolen.

Shortly before instituting this equitable proceeding, Mr. McDowell discovered that many of his private papers, etc., which had been stolen from his office, were in the possession of Joseph A. Burdeau, in his capacity as Special Assistant to the Attorney General, and assigned by the Attorney General to conduct a Grand Jury investigation in the Western District of Pennsylvania. That the appellant was using these private papers in interviewing prospective witnesses in the proposed Grand Jury investigation. He learned that the parties who had taken his papers were seeking the aid of the Department of Justice and were using the stolen papers and books to further that end. Until after the hearing in the lower court, he had no definite information as to whether the taking of his papers had been by private individuals for themselves or by the government officers and agents, in whose possession he ascertained them to be. He therefore caused this proceeding to be instituted in this lower court (page 5 of record) for the purpose (a) of making discovery as to the facts, and (b) recovering the stolen property. He was convinced at the time that government agents had undoubtedly been partly responsible for the illegal seizure and appropriation thereof.

The appellant in his answer (Record, page 9) admitted possession of a portion of said private and personal papers, denying their personal and private character, and partially informing the court as to the

manner in which they had been taken by the persons from whom the appellant had received them. The testimony taken by the appellee in the court below was largely the testimony of unfriendly witnesses, and it clearly established, as the court below in its opinion (Record, page 2) found, that the private and personal books, papers and records of the appellee had been stolen by the officers, agents and employees of Henry L. Doherty & Company, and that said stolen property had been delivered by them to the appellant, Joseph A. Burdeau, Special Assistant to the Attorney General, who knew that they had been illegally taken from the appellee (Record, pages 75, 90, 91). The court thereupon made the decree from which this appeal is taken, specifically basing the decree "solely upon the ground that the government should not use stolen property for any purpose after demand made for its return."

This appeal was taken without reference being made to the question of the jurisdiction of the court below in either the petition for the appeal (Record, page 104), or in the order allowing the appeal (Record, page 104). The question of the jurisdiction of the court below has not been certified to this court. The assignments of error (Record, page 105) aver in various forms that a question of the construction and application of the Constitution of the United States is involved, although the court below bases its opinion on entirely other and independent grounds, viz: "That the government should not use stolen property for any purpose after demand made for its return."

Statement of the Questions Involved in Defendant's Motion.

(a) Is the question of the jurisdiction of the District Court reviewable by the Supreme Court in the absence of a certification of that question by the District Court and when the question does not appear either in the opinion and decree of the Court below or in the order allowing the appeal?

(b) Will an appeal lie direct to this Court in an equitable proceeding in which the opinion and decree of the District Court specifically states the ground of its decision, and the ground thus assigned involves none of the questions designated in Section 238 of the Judicial Code from which the appellate jurisdiction of this Court in this case must arise?

Argument in Behalf of Appellee's Motion to Dismiss.

By the process of elimination it is apparent that the only two grounds upon which it would be possible for appellant to assert the jurisdiction of the Supreme Court to review the decision of the Court below in this case under Section 238 of the Judicial Code as amended by the Act of January 28, 1915 *(36 Stat. 1157; 38 Stat. 803),* are (1) that "the jurisdiction of the Court is in issue" and (2) that "the case involves the construction or the application of the Constitution of the United States."

This motion denies that the limited jurisdiction of this Court can be maintained in this case upon either ground.

It is respectfully asserted that only the Circuit Court of Appeals has jurisdiction to review the judgment in this case.

I.

(a) IS THE QUESTION OF THE JURISDICTION OF THE DISTRICT COURT REVIEWABLE BY THE SUPREME COURT IN THE ABSENCE OF A CERTIFICATION OF THAT QUESTION BY THE DISRICT COURT AND WHEN THE QUESTION DOES NOT APPEAR EITHER IN THE OPINION AND DECREE OF THE COURT BELOW OR IN THE ORDER ALLOWING THE APPEAL?

The question of the jurisdiction of the District Court is one of the only two possible propositions upon which the appellant may claim that the jurisdiction

of the Supreme Court can arise. If, however, the government proposes to raise the question it is essential that it should bring it properly before the Court. This we contend they have failed to do.

It has been repeatedly held by this Court that in order to maintain its appellate jurisdiction the record must distinctly and unequivocally show that the Court below sends up for consideration a single and definite question of jurisdiction, and that this question must appear either (1) by the terms of the decree appealed from and the order allowing the appeal; or (2) by a separate certificate of the Court below. In the case at bar there is nothing in the opinion and decree appealed from, nor in the order allowing the appeal, suggesting or presenting for the consideration of this Court the question of jurisdiction under Section 238 of the Judicial Code, nor has the Court below by separate certificate or otherwise sent up for the consideration of this Court the question of jurisdiction. The question of the jurisdiction of the Court below is not before this Court.

It is also contended that if the question of jurisdiction is in any way involved it is not the jurisdiction of the District Court as a Court of the United States, but only the jurisdiction and authority of a chancelor, under the facts presented, to make the order and decree from which this appeal is taken. That question is one for the Circuit Court of Appeals to review.

II.

(b) WILL AN APPEAL LIE DIRECT TO THIS COURT IN AN EQUITABLE PROCEEDING IN WHICH THE OPINION AND DECREE OF THE DISTRICT COURT SPECIFICALLY STATES THE GROUND OF ITS DECISION, AND THE GROUND THUS ASSIGNED INVOLVES NONE OF THE QUESTIONS DESIGNATED IN SECTION 238 OF THE JUDICIAL CODE FROM WHICH THE APPELLATE JURISDICTION OF THIS COURT IN THIS CASE MUST ARISE?

This was an equitable proceeding as is evidenced by the fact that the government is seeking a review on appeal rather than by writ of error. The appellee at the time of instituting the proceeding knew that his office had been forcibly seized and that the office and all of its contents including a large quantity of private and personal books, papers, letters, correspondence, diaries and other property had remained in the physical possession and control of the trespassors from March 23, 1920, to July 15, 1920, and that at some time during that period all of said private and personal papers and records had been appropriated by either the persons holding forcible possession thereof or their agents or other persons. It was not until the 15th of July, 1920, that he discovered that all his private and personal property had been stolen and removed. The various persons who had access to this property were unknown to him. Whether private citizens or government agents were responsible for the forcible and illegal seizure he did not know. Sometime prior to July 15, 1920, however, he learned that complaints had been lodged with

the Department of Justice. A short time before he instituted this proceeding he learned from proposed government witnesses who were interviewed by the appellant that at least a portion of his private and personal papers and property were in the possession of the appellant, and that they were being used by the appellant for the purpose of securing other evidence to be used in prosecuting him in the Federal Court. Thereupon the equitable proceeding was instituted (1) for discovery as to who had actually stolen his private and personal property; (2) to recover such of it as was within the control and jurisdiction of the Court; (3) and to restrain the officers of the government from using the stolen property, which was illegally in their possession. The possession of these private papers by the appellant was certainly illegal, and if on discovery it had been ascertained that the seizure had been made by the appellant or other government agents, the constitutional as well as the legal rights of the appellee would have been violated.

To make discovery it was necessary to use unfriendly witness who had directly or indirectly participated in the raiding and looting of his office and the theft of his property. It was determined from this testimony that the persons who seized his property complained to and secured the aid of the Department of Justice on about June 11, 1920, or more than one month before the last of the property was appropriated by them and removed from appellee's office. It was clearly established and not denied that two safes were drilled and bored and a desk jimmied in order that the contents might be secured and appropriated by the

persons who complained to and secured the aid and assistance of the Department of Justice. No testimony was offered by the appellant. The court very properly held that the private and personal papers of the appellee had been stolen and that such stolen papers were in the hands of the appellant as Special Assistant to the Attorney General, and that his possession was illegal, and that the appellee was therefore entitled to the return of his property.

The sole ground upon which the District Court based its decree is found in the following paragraph of its opinion:

> "It is proper to state that, so far as appears in this proceeding, neither the said Joseph A. Burdeau nor any other officer or agent of the United States, or any of the departments, had anything to do with the search of the petitioner's safes, files and desk, or the abstraction therefrom of any of the writings referred to in the petition, and the order made in this case is not made because of any unlawful act on the part of anybody representing the Unted States or any of its departments but solely upon the ground that the Government should not use stolen property for any purpose after demand made for its return."

From this it is clear that the Court did not undertake to construe or apply the Constitution of the United States. As a chancellor the Court undertook to adjudicate the equities of the parties and as a further evidence of this single purpose of the Court the attorney that represented the persons who did the actual looting of appellee's office declined, at the Court's suggestion,

to enter an appearance and thereby submit his clients to the jurisdiction of the Court, they being residents and citizens of New York in attendance at court as witnesses. Undoubtedly had they submitted themselves to the jurisdiction of the Court the order would have been extended to include the return of the portion of the private papers of the appellee still remaining in their possession.

The question as to the construction and application of the constitution is injected into this record in only two ways.

(1) In the original petition of the appellee it is raised conditional upon the discovery sought, establishing that the illegal seizure and theft of the private and personal papers of the appellee was committed by or at the instance of the appellant or other agents of the government.

(2) In the assignments of error of the appellant, (Record, page 105) in his motion to dismiss (Record, page 100) and in consequence of his apparent misapprehension of the real nature of the proceeding, and his apparent conviction that the Court had no jurisdiction to decree the relief sought except upon the ground that the illegal seizure and theft of the private papers in question was committed by agents of the government.

The facts established at the trial eliminated the constitutional question from the petitioner's case, and the appellant cannot inject it into the case through his assignments of error or because of his misapprehension of the real issue that was presented to the Court after the facts were discovered.

This proposition seems to have been clearly adjudicated by this Court in the cases of *Ansbro vs. United States,* 159 U. S. 695 (697), in which the Court said:

> "A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument, but a definite issue in respect to the possession of the right must be distinctly deducible from the record before the judgment of the Court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally but necessarily and directly, that our jurisdiction can be invoked for that reason. *Borgmeyer v. Idler,* 159 U. S. 408; *Carey v. Railway Company,* 150 U. S. 170; *In re Lennon,* 150 U. S. 395; *Northern Pacific Railroad Co. v. Amato,* 144 U. S. 465, 472; *Sayward v. Denny,* 158 U. S. 180. An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the Court below and rulings asked thereon, so as to give jurisdiction to this Court under the 5th Section of the Act of March 3, 1891."

In *Cornell v. Green,* 163 U. S. 75, the Ansbro case is cited and emphasized.

In *Budzisz v. Illinois Steel Company,* 170 U. S. 41 (44), the Court, speaking through Mr. Justice Shiras, says, "Mere allegations to that effect not based upon the facts of the case do not create a case which we are authorized to review."

So in the case at bar the appellant's allegation that a constitutional question is involved is based purely upon his misapprehension of the real issues and not upon the actual facts presented, and the real questions adjudicated by the Court below.

Therefore, appellee's motion to dismiss should be allowed and the appeal dismissed.

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